VIRGINIA LAW REGISTER

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Judge James Keith.

The death of Judge James Keith, on January 2nd, removes from the sight of men a learned jurist, a gallant soldier and a man of the highest character. During the long service of Judge Keith as President of our Supreme Court of Appeals he won, as he deserved, the admiration and respect of the entire Commonwealth. Born in the county of Fauquier of distinguished ancestry, a kinsman of our greatest Chief Justice, John Marshall, educated at the University of Virginia, a soldier of the Confederacy, a lawyer of promise, a circuit judge at the age of thirty, Judge Keith soon attracted attention not only by marked ability and a stern sense of justice, but by the fearless and conscientious way in which he administered the law. He indeed "feared the face of no man," and Right was a thing with him that admitted of no compromise, shade or question. His election to the Supreme Bench was a foregone conclusion as soon as his name was mentioned for the place, and his colleagues upon the Bench did not hesitate one moment in selecting him as their presiding officer. He proved himself in every way worthy of the confidence imposed upon him. Learned in the law; of great wisdom in the determination of difficult problems; his decisions marked by conciseness and clearness, he was an ideal judge. When after years of faithful service he retired to a well-earned repose, he was honored, respected and beloved as a man, and his death comes as a shock to the people who knew and esteemed him and hardly realized that he had passed by a considerable number of years the three score and ten of the Psalmist.

We paid our tribute to him in the January, 1915, number of the Register (1 Va. Law Reg., N. S. 623) when he retired from the Bench. No more fitting tribute, however, can be paid to his

memory than the remarks made by Judge Whittle, President of the Court over which Judge Keith had so long and ably presided, when the resolutions of the Bar were presented to the Court and ordered to be spread on its minutes. We give them as they were delivered:

"We have received with profound sensibility the announcement of the death of Judge James Keith, for more than twenty years the distinguished president of this court. We deem it a high privilege to unite with the bar in honoring his memory.

"In a commonwealth possessed of an extraordinary roster of distinguished sons, as citizen, lawyer, soldier, legislator and jurist, Judge Keith's just claim to rank among the foremost will not be challenged. Indeed, not one of the great Virginia judges that preceded him contributed more to the wealth of the jurisprudence of the state than did he.

"Ripe in fullness of days, and rich in honors, he died as he had lived, a chivalrous gentleman. 'Who spoke no slander, no, nor listened to it,' 'Who reverenced his conscience as his king,' 'Who never sold the truth to serve the hour,' and 'stood four square to all the winds that blow.' May we not hope that he has gone forth 'on that sea of peace and love which has no waves nor shores but those of bliss that knows no end.'"

Hill Carter.

Hardly had the Bar of Richmond met to pass suitable resolutions upon the death of Judge Keith, than they learned of the death of one of their number, who was a great lawyer, an upright man, a gallant soldier, a chivalrous gentleman and a lovable and beloved friend.

The REGISTER cannot forbear to pay its tribute to this citizen of our Commonwealth, who was true to every high tradition of its past; to this lawyer who was an honor to the Bar; to this man who in every sense of the word was a man without fear and without reproach.

Hill Carter was a native of Caroline, removing into Hanover a few years before our Civil War. At the age of seventeen he enlisted in the Confederate Army and served gallantly, being captured just before Lee's surrender and was a prisoner of war for three months.

He studied law under Judge Brockenborough at Lexington and commenced the practice in nis adopted county of Hanover. In 1870 he became attorney for the Commonwealth of that county and served with marked ability for eight years. He rapidly made his way to the front, not only by his marked ability, but by an honesty of purpose and a high sense of right and justice which won for him the confidence alike of clients and courts. He was a man of the greatest courtesy, the most kindly consideration and never in the heat of the most exasperating contests did he ever excite the ill-will of any opponent. Of a keen sense of humor he knew how to laugh and how to take laughter. His common sense was of the most uncommon order and his judgment was so sound and reliable that he was as able an adviser in the office as he was brilliant as an advocate in the courts. Of a most lovable personality he made and kept warm and constant friends. No man was ever more upright. No man was ever more conscientious in the discharge of every duty. The Bar at which he practiced never had a lawyer whose whole life reflected better the high standing which characterized it. To the writer of these lines there comes a sense of personal loss, when the thought comes that never again will the sound of that cheerful voice delight the ear, and the genial smile and hearty handclasp make words of welcome, indeed, thrice welcome. Another great Virginia lawyer has joined the mighty shades of Virginia's mighty dead. As Homer tells us that the shades arose when Achilles came amongst them to pay him homage, so may we imagine the shades of Virginia's great lawyers welcomed with outstretched hands the kindly shade of this noble gentleman, this brilliant lawyer, this honest, upright, brave and tender-hearted man.

The Code of 1919.

So the revisors suggest it shall be called and so say we. Just one hundred years from the date of the suggested christening of this new child in—and of—the law the Code of 1819 was issued. An inspection of this ancient tome, in comparison with the new volume, might not prove uninteresting, and one would be surprised to see how much of our law has stood the test and

remains in force after a hundred years of legislative tinkering and court construction. But our profession is too busy today to make comparisons or look to the past. The present volume demands our attention and is worthy of it. The brief report of the revisors attached to the volume gives very little idea of the enormous work done by these gentlemen. They do not propose to extend this report in the manner in which the report of the revisors was extended in 1849. To do so would involve considerable expense and the notes would not be readily accessible to the whole profession. In lieu thereof it is proposed to place immediately beneath each section in which any material change has been made an explanatory note to be designated as "Revisors' note." The wisdom of this plan is self-evident and will prevent much confusion. We are glad to see that the revisors propose to use Pollard's admirable annotations and to continue and bring them up to date under Mr. L. C. Phillips' admirable supervision.

The profession has grown so accustomed to the use of Pollard's Code and its annotations that it would be almost lost with any Code which did not contain them.

We note with gerat pleasure that the revisors have adopted the suggestion which the REGISTER has now for many years made as an almost essential feature of wise jurisprudence, i. e., to allow a peremptory challenge of jurors to the Commonwealth as well as to the prisoner. This is done in nearly every—indeed we might say in every—state, but Virginia. Many mistrials will be prevented when this is the law. We have in more instances than one seen a juryman in the panel whose peculiarities were such that no conviction was possible, no matter how strong the evidence, and yet the Commonwealth had to sit mute and proceed with days of exhausting labor, fully aware that it was all in vain.

The revisors do not adopt Code Pleading, but have so enlarged the informal proceedings by motion that all actions at law can proceed by motion before any court which would have jurisdiction of such action. A very salutary section has been added providing that whenever an action at law had been brought where the proceeding should have been in Equity or vice versa, the action should not be dismissed for that cause, but be remanded to the

proper forum and the pleadings so amended as to conform to the proper mode of procedure.

The subject of the competency of witnesses has received careful consideration by the revisors and a most radical change has been made in the rule disqualifying one party to the transaction where the other is dead or incompetent to testify. The new section is as follows:

> "In an action or suit by or against a person who from any cause is incapable of testifying, by or against the committee, trustee, executor, administrator, heir or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; and in any action or suit if such party testifies, all entries, memoranda and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue may be received as evidence."

The revisors express the belief that this section, together with the great safeguard of cross-examination, would be ample protection for the estates of persons laboring under disability or who are incapable of testifying. "In the business affairs," says the revisors, "of life all evidence bearing upon the question at issue is received and considered by the business world, and it seemed proper that the same rule should obtain in courts of justice which are enforcing rights arising out of such business transactions."

We often heard that great lawyer, Judge Wm. J. Robertson, used practically the same argument when discussing our disqualifying rules. He believed that hearsay ought to be admitted under certain circumstances and insisted that the rules of evidence were in many instances against the rule of common sense. "If we governed our daily business life," he would say, "by the rules of evidence, we would find ourselves paupers in the course of six months."

The revisors state that they have made many substantial changes in the statutes, but believe that most of them will meet with such ready concurrence that it would be unnecessary to mention them even if it could be done within a reasonable space. We believe that no changes have been made by the three learned lawyers who have given time and patience and laborious zeal to

this work, which will not, when carefully considered, meet with approval. We believe they have had ability to see evils and omissions. We believe their knowledge both as lawyers in theory and in practical experience has given them the power to construct laws which will be alike valuable and useful.

It is almost impossible for our General Assembly to give the time and attention to many salutary and necessary changes in our law. So many acts are drawn carelessly, considered hastily, amended heedlessly and passed without due consideration. This is no reflection upon the members of our legislative body. It is the fault of our organic law, which gives them an enormous amount of work to do and very little time in which to do it. But three learned, scholarly men—skilled alike in the theory and practice of law, can give, as our revisors have given, careful consideration and calm reflection to the good a law can accomplish, or the evils it can prevent, and so frame it as to accomplish what should be the aim of all law, the attainment of justice, the victory of right, the prevention of wrong and evil. The rather novel procedure was adopted of calling the revisors and the clerk before the committee on Courts of Justice in order that they might explain the new features of the Code and expedite its adoption.

At the risk of repetition we insert here from the *Times-Dispatch* a partial report of the proceedings before that committee:

> "Judge Burks said that it would be a physical impossibility to present to the Senate such a report as required by the resolution of Senator Buchanan, and that the General Assembly would have to take a great deal of the work on faith unless they read it themselves. The only advice the members received along the line sought was that it was possible, in an indefinite time, perhaps less than a week, for the sections changed to be checked off. But as probably two-thirds of them have been changed, some only in verbiage, and others in substance, Judge Burks, Mr. Anderson and Clerk Williams all asserted that it was a stupendous task that could not be done during the session of the Legislature to segregate the substantial changes from those of diction only. Judge Burks and Mr. Anderson declined to advise the committee in what manner to proceed, though Clerk Williams advised that the adoption as a whole at once and future amendments constituted the only sane method of procedure.

"Judge Burks said that the younger members of the bar were howling for Code procedure, and that the revisors had changed section 3211 to allow every action at law to proceed by motion. He said they were reluctant entirely to disarm the older members of the bar who had learned common law pleading, so that it was the intention to let the Code methods grow gradually out of this change if found good. And in criminal cases he said that a change allowed the State four peremptory challenges of jurymen as well as the defendant, as they had in mind to allow the accused always one fair trial, and this did not hinder the fairness of a trial.

"Judge Burks said that it was an error to assert that the new Code required the judges on the Court of Appeals to render a statement of reasons for every writ of error or appeal refused. He further stated that that would equal writing an opinion in every case considered—a task that would overburden the judges and delay their work. It was said by Judge Burks that some of the subjects in the old Code were in very bad shape, and had to be almost entirely rewritten, as in the case of attachments, which he said they "whacked all to pieces and made as simple as possible," adding only one ground; namely, that of a fugitive from justice. Mr. Burks stated that in the section referring to mechanics' liens they struck out the clause making the owner of a building personally responsible to the man who furnished the material to the contractor, because it was the source of too much trouble and could be attended to in every case by separate contracts between the owner and the furnisher, if the latter was unwilling to trust the contractor.

"He stated that in the law of evidence there were so many exceptions to the section removing interest as a disqualification to testify that the new Code removed all disqualifications except that of confidential communications and relations. He insisted that there was no reason for the courts' not dealing with business men in a business way as they dealt among themselves.

"What seems to be a favorable change is one in the law of damages making contributory negligence on the part of one injured or killed at railroad crossings and such places no bar to recovery where it is first clearly established that the railroad is guilty of negligence itself. He also said that the revisors had seen fit to enlarge the penalty for involuntary manslaughter, allowing the penalty to be that of a felony in aggravated cases in the discretion of the jury. He placed this on the ground of too many people being killed by street car and automobile drivers in reckless disregard for life.

"Judge Burks advised the committee that they started out by determining to do nothing contrary to public policy and good. He said that they also did not offer any new law that all three of them did not concur in as equitable and just. He remarked that if their Code would not stand investigation they would feel that their work had been useless, and that it must come to the light of day as they wanted it to do.

"Mr. Anderson stated that they had had in view the simplification of the methods and the expedition of the administration of justice; that they had given every section careful consideration separately and jointly, both earnestly and conscientiously, and the wisdom of their work was now for others to consider, and the future to determine.

"Clerk Williams then, for the benefit of those present, went into a somewhat detailed account of the preparation and printing of the Code. As a result of the whole meeting and the discussion by the three concerned with the preparation of the new Code most, if not all, the opposition and fear appeared to have melted, though some took the view that the meeting had availed nothing."

We believe the sooner the Code is adopted, the better. Any palpable error will soon be corrected, but our confidence in the three revisors is such we personally would be willing to accept their work.

Taxes—Situs of Property—Bank Deposits.

A decision of the Supreme Court of the United States in the case of *Fidelity, etc., Co. Executor and Trustee of Ewald* v. *City of Louisville* is of interest to those of us in this State who wish to see taxes properly assessed and payment duly made.

Ewald was domiciled in Louisville, Ky., but carried on business in St. Louis, Missouri, where he had formerly lived. Money derived from this business was kept in the St. Louis banks, subject to Ewald's order alone and was not used in the business. The question before the court was whether that money was taxable by the City of Louisville—Ewald's domicile. The Supreme Court held that it was affirming the judgment of the lower court. Not only did the Supreme Court thus hold, but it conceded that this money could also have been taxed by the State of Missouri. "Liability to taxation in one state does not necessarily exclude liability in

another," says the court through Mr. Justice Holmes, the chief Justice dissenting:

> "The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the state so chooses, may be measured more or less by reference to the riches of the person taxed. Unless it is declared unlawful by authority, we see nothing to hinder the state from taking a man's credits into account. But, so far from being declared unlawful, it has been decided by this court that whether a state shall measure the contribution by the value of such credits and choses in action, not exempted by superior authority, is the state's affair, not to be interfered with by the United States, and therefore that a state may tax a man for a debt due from a resident of another state. Kirtland *v.* Hotchkiss, 100 U. S. 491, 25 L. ed. 558. See also Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189."

The rather remarkable defense was made that Ewald's representative had been denied the equal protection of the laws because the decision of the Supreme Court of Kentucky was inconsistent with the earlier decisions of the Kentucky Court.

But the Supreme Court of the United States says very properly, "with the consistency or inconsistency of the Kentucky cases we have nothing to do." *Lombard* v. *West Chicago Park*, 181 U. S. 33, etc. We presume that, like all other appellate courts, the Kentucky Court of Appeals is free to depart from precedents if, on further reflection, it thinks them wrong.

Taxation. Merchant's Capital—Our Supreme Court Reverses Itself.

Our Supreme Court of Appeals certainly felt itself free to depart from precedent, when in an opinion just handed down it reversed itself upon the question of the right of cities and counties to assess a tax in excess of thirty cents on the $100 upon the capital of merchants. The two test cases were those of Drewry Hughes Co. and O. H. Berry & Co. *v.* The City of Richmond. In November, 1916 the Court decided in favor of the merchants.

Petitions for rehearing were filed together with supplementary petitions from the Board of Supervisors of various counties and from the State Tax Board.

Two members of the Court, as at present constituted, did participate in the former decision.

However, the decision was granted with the consent of all the judges participating in the previous decision.

The opinion finally stated that the question resolved itself into one contention. That is whether the segregation tax act of 1915 intended to limit the taxing of the capital of merchants to 30 cents or whether it intended to exclude the capital of merchants from consideration in the act. The court adopted the latter view.

"The opinion concluded with this statement: 'There can be no question about the power to tax different classes of intangible property at different rates. A contrary holding would strike a fatal blow to the entire plan of taxation as established by the General Assembly in 1915 and would furthermore be contrary to the settled law on the subject. Therefore, the former decision is reversed.' "

The city of Richmond has been levying a tax of $1.40 upon the capital of merchants and the rate in different counties varies from 85 cents to $2.

That this decision as the Court well says is serious and of far-reaching effect on local taxation through the State, cannot be questioned. There has always been grave doubt among many of the profession as to the correctness of the first decision. A new avenue of taxation, or rather a new way to raise revenue has been made possible to the cities and counties by this decision.

Constitutional Law—Impairment of Contracts—Eminent Domain.

In the case of *Contributors to the Pennsylvania Hospital* v. *City of Philadelphia,* the Supreme Court of the United States has rendered an important decision which does not seem to have attracted much attention, but which in our opinion is in more ways than one remarkable.

The Pennsylvania Hospital was a charitable organization organized under the laws of Pennsylvania.

It established in 1841 in Philadelphia a hospital for the care and cure of the insane. Solicitous lest the opening of streets, etc., through its grounds might injuriously affect the performance of its work in 1854 some of its managers memorialized the Legislature on that subject and this resulted in the passage of a law specially forbidding the opening of any street, etc., without the consent of the hospital authorities. This act, of course, if it had stood alone would have presented no difficulty and could have been repealed at any time. But the act was conditioned upon the hospital making certain payments and furnishing ground for a designated public street or streets and these terms were complied with. In other words there was a contract based upon a valuable consideration between the State and the hospital.

In 1913 the City in pursuance of authority granted it by the State undertook to acquire by eminent domain some of the hospital land for a public street. The hospital resisted and set up its contract. But the Pennsylvania Courts, Subordinate and Supreme, not only took the land, but the rights under the contract of 1854 and denied, that by so doing any obligation of the contract was impaired. The right to do so was upheld on the ground that the power of eminent domain was so inherently governmental in character, so essential for the public welfare that it was not susceptible of being abridged by agreement and therefore the action of the City in exerting the power of eminent domain was not repugnant either to the State Constitution or to the contract clause of the United States.

The Supreme Court of the United States, the Chief Justice delivering the unanimous opinion of the court says:

> "It is apparent that the fundamental question, therefore, is, Did the Constitution of the United States prevent the exertion of the right of eminent domain to provide for the street in question because of the binding effect of the contract previously made, excluding the right to open the street through the land without the consent of the hospital? We say this is the question, since, if the possibility were to be conceded that power existed to restrain by contract the further exercise by government of its right to exert eminent domain, it would be unthinkable that the existence of such right of contract could be rendered unavailing by directing proceedings in eminent domain against the contract, for this would be a mere evasion

> of the assumed power. On the other hand, if there can be no right to restrain by contract the power of eminent domain, it must also of necessity follow that any contract by which it was sought to accomplish that result would be inefficacious for want of power. And these considerations bring us to weigh and decide the real and ultimate question that is, the right to take the property by eminent domain, which embraces within itself, as the part is contained in the whole, any supposed right of contract limiting or restraining that authority. We are of opinion that the conclusions of the court below, in so far as they dealt with the contract clause of the Constitution of the United States, were clearly not repugnant to such clause. There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the states cannot, by virtue of the contract clause, be held to have devested themselves by contract of the right to exert their governmental authority in matters which, from their very nature, so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties. Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. ed. 989; Stone *v.* Mississippi, 101 U. S. 814, 25 L. ed. 1079; Butchers' Union S. H. & L. S. L. Co. *v.* Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Douglas *v.* Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; Manigault *v.* Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; Texas & N. O. R. Co. *v.* Miller, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534."

That a State cannot contract so as to divest itself of its right of eminent domain seems to have been well settled: but that the State should proceed to condemn its own contract, as was done in this case, seems to us most remarkable. The Court, however, in holding the contract in the present case unavailing renders any decision upon the other point unnecessary. But by affirming the lower courts, it certainly remains law, as far as the Supreme Court of the United States is concerned, that a State can make a contract and then condemn it under eminent domain. It may be all right, but it does look to us, to say the least of it, peculiar.